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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 JUNE B. CULBERTSON,

7 Plaintiff,

8 v.

9 NANCY BERRYHILL, Acting Commissioner
10 of Social Security,

11 Defendant.

Case No. 3:17-cv-05450-TLF

ORDER REVERSING DEFENDANT'S
DECISION TO DENY BENEFITS AND
REMANDING FOR FURTHER
PROCEEDINGS

12 June B. Culbertson has brought this matter for judicial review of defendant's denial of
13 her application for disability insurance and supplemental security income (SSI) benefits. The
14 parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C.
15 § 636(c), Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth
16 below, the Court reverses the Commissioner's decision denying benefits and remands for further
17 administrative proceedings.
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19
20 I. BACKGROUND

21 Ms. Culbertson filed an application for a period of disability and disability insurance
22 benefits on December 11, 2015. Dkt. 8, Administrative Record (AR) 15. She alleged in her
23 application that she became disabled beginning December 31, 2009.¹ *Id.* She later amended her
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25
26 ¹ SSDI benefits are based on earnings, and the benefits are limited to the period of insurance. 42 U.S.C. §§ 401(b),
423(c)(1), (d)(1)(A). The legal criteria for deciding whether a disability exists is the same under both SSDI and
Supplemental Security Income (SSI). *Diedrich v. Berryhill*, 874 F.3d 634, 637 (9th Cir. 2017).

1 alleged onset date to October 15, 2013. *Id.* Her application was denied on initial administrative
2 review and on reconsideration. *Id.* A hearing was held before an administrative law judge (ALJ)
3 on April 29, 2016. AR 40-74. Ms. Culbertson and a vocational expert appeared and testified.

4 The ALJ found that Ms. Culbertson could perform jobs that exist in significant numbers
5 in the national economy, and therefore that she was not disabled. AR 15-30 (ALJ decision dated
6 November 2, 2016). The Appeals Council denied Ms. Culbertson's request for review on April
7 27, 2017, making the ALJ's decision the final decision of the Commissioner. AR 1. Ms.
8 Culbertson appealed that decision in a complaint filed with this Court on June 14, 2017. Dkt. 4;
9 20 C.F.R. § 404.981.

11 Ms. Culbertson seeks reversal of the ALJ's decision and remand for further
12 administrative proceedings including a new hearing, arguing that the ALJ misapplied the law and
13 lacked substantial evidence for her decision. Ms. Culbertson contends that the ALJ erred at steps
14 two and five of the five-step criteria. The alleged errors concern the ALJ's reasons for finding
15 migraine headaches not to be a severe impairment and for discounting Ms. Culbertson's
16 statements about the severity of various symptoms. For the reasons set forth below, the
17 undersigned concludes that the ALJ did not properly apply the law at step five of the disability
18 analysis and substantial evidence does not support her decision concerning Ms. Culbertson's
19 testimony about severity of symptoms. Consequently, the undersigned reverses the decision to
20 deny benefits and remands for further proceedings.

23 II. STANDARD OF REVIEW AND SCOPE OF REVIEW

24 The Commissioner employs a five-step "sequential evaluation process" to determine
25 whether a claimant is disabled. 20 C.F.R. § 404.1520. If the ALJ finds the claimant disabled or
26

1 not disabled at any particular step, the ALJ makes the disability determination at that step and the
2 sequential evaluation process ends. *See id.*

3 The five steps are a set of criteria by which the ALJ considers: (1) Does the claimant
4 presently work in substantial gainful activity? (2) Is the claimant's impairment (or combination
5 of impairments) severe? (3) Does the claimant's impairment (or combination) equal or meet an
6 impairment that is listed in the regulations? (4) Does the claimant have RFC, and if so, does this
7 RFC show that the complainant would be able to perform relevant work that he or she has done
8 in the past? And (5) if the claimant cannot perform previous work, are there significant numbers
9 of jobs that exist in the national economy that the complainant nevertheless would be able to
10 perform in the future? *Keyser v. Comm'r of Soc. Sec. Admin.*, 648 F.3d 721, 724-25 (9th Cir.
11 2011).

13 At issue here is the ALJ's step two determination about which of Ms. Culbertson's
14 impairments qualify as "severe," the ALJ's consideration of Ms. Culbertson's statements in
15 assessing her residual functional capacity (RFC), and the ALJ's step five finding that Ms.
16 Culbertson can perform jobs existing in significant numbers in the national economy.

18 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error;
19 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,
20 654 (9th Cir. 2017). Substantial evidence is "such relevant evidence as a reasonable mind might
21 accept as adequate to support a conclusion." *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir.
22 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.
23 1988)). This requires "more than a mere scintilla," though "less than a preponderance" of the
24 evidence. *Id.* (quoting *Desrosiers*, 846 F.2d at 576). If more than one rational interpretation can
25 be drawn from the evidence, then the Court must uphold the ALJ's interpretation. *Orn v. Astrue*,

1 495 F.3d 625, 630 (9th Cir. 2007). The Court may not affirm by locating a quantum of
2 supporting evidence and ignoring the non-supporting evidence. *Id.*

3 The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759
4 F.3d 995, 1009 (9th Cir. 2014). The Court is required to weigh both the evidence that supports,
5 and evidence that does not support, the ALJ's conclusion. *Id.* The Court may not affirm the
6 decision of the ALJ for a reason upon which the ALJ did not rely. *Id.* Only the reasons identified
7 by the ALJ are considered in the scope of the Court's review. *Id.*

9 III. THE ALJ'S STEP TWO DETERMINATION

10 At step two of the sequential evaluation process, the ALJ must determine if an
11 impairment is "severe." 20 C.F.R. § 404.1520. In this case, the ALJ determined that Ms.
12 Culbertson had four severe impairments: Crohn's disease, degenerative disc disease of the
13 cervical spine, degenerative joint disease and osteoarthritis of the ankles, and degenerative joint
14 disease and osteoarthritis of the knees. AR 17. Ms. Culbertson contends that the ALJ erred in
15 failing to find her migraine headaches to also be a severe impairment at step two.

17 An impairment is "not severe" if it does not "significantly limit" a claimant's mental or
18 physical abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii); Social Security
19 Ruling (SSR) 96-3p, 1996 WL 374181, at *1. Basic work activities are those "abilities and
20 aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b); SSR 85-28, 1985 WL 56856, at
21 *3. An impairment is not severe if the evidence establishes only a slight abnormality that has "no
22 more than a minimal effect on an individual[']s ability to work." SSR 85-28, 1985 WL 56856, at
23 *3; *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841 F.2d 303, 306
24 (9th Cir. 1988).

26 The step two inquiry is a *de minimis* screening device used to dispose of groundless

1 claims. *Smolen*, 80 F.3d at 1290. The Ninth Circuit recently emphasized that this inquiry “is not
2 meant to identify the impairments that should be taken into account when determining the RFC.”
3 *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017) (rejecting claim that ALJ erred after
4 second hearing, where ALJ found new severe impairments but did not change RFC). The court
5 noted that an ALJ assessing a claimant's RFC before steps four and five “must consider
6 limitations and restrictions imposed by all of an individual's impairments, even those that are not
7 ‘severe.’” *Buck*, 869 F.3d at 1049 (citing Titles II & XVI: Assessing Residual Functional
8 Capacity in Initial Claims, Social Security Ruling (“SSR”) 96-8p, 1996 WL 374184, at *5
9 (S.S.A. July 2, 1996)). Thus, the RFC “should be exactly the same regardless of whether certain
10 impairments are considered ‘severe’ or not” at step two. *Buck*, 869 F.3d at 1049.

12 The Ninth Circuit concluded, in the case before it, that because the ALJ decided step two
13 in the claimant's favor and was required to consider all impairments in the RFC, whether
14 “severe” or not, “[a]ny alleged error is therefore harmless and cannot be the basis for a remand.”
15 *Buck*, 869 F.3d at 1049 (citing *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)).

17 The same is true here. Because the ALJ decided step two in Ms. Culbertson’s favor, the
18 ALJ was required to consider evidence of any and all impairments, severe or not, in assessing
19 Ms. Culbertson’s RFC. *See Buck*, 869 F.3d at 1049. The ALJ’s discussion indicates that she did
20 consider Ms. Culbertson’s complaints of headaches and their effects in assessing Ms.
21 Culbertson’s RFC. AR 24-25.

23 Ms. Culbertson further challenges *how* the ALJ considered her migraines in the RFC
24 analysis. That argument is addressed below.

1 IV. THE ALJ’S CONSIDERATION OF MS. CULBERTSON’S TESTIMONY

2 The ALJ found Ms. Culbertson’s testimony on the severity of her symptoms “not entirely
3 consistent with the medical evidence and other evidence in the record.” AR 22. Based on this
4 determination and her evaluation of the medical opinion evidence—which Ms. Culbertson does
5 not challenge—the ALJ found that Ms. Culbertson has the residual functional capacity

6 **to perform sedentary work as defined in 20 CFR 404.1567(a). She can**
7 **occasionally reach overhead. She can occasionally balance, stoop, kneel,**
8 **crouch, and crawl. She can occasionally climb ramps or stairs but cannot**
9 **climb ladders, ropes, or scaffolds. The claimant should avoid concentrated**
10 **exposure to extreme cold, extreme heat, vibration, fumes, odor, dust, gases,**
11 **and hazards. The claimant should have ready access to a bathroom.**

12 AR 25 (emphasis added).

13 Ms. Culbertson contends that the ALJ did not provide adequate reasons to reject her
14 testimony on the severity of several conditions. The Court agrees.

15 At step five of the sequential disability evaluation process, the ALJ must show there are a
16 significant number of jobs in the national economy the claimant is able to perform. *Tackett v.*
17 *Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); 20 C.F.R. § 404.1520(e). The ALJ can do this
18 through testimony of a vocational expert. *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-63 (9th Cir.
19 2000). An ALJ’s step five determination will be upheld if the weight of the medical evidence
20 supports the hypothetical posed to the vocational expert. *Martinez v. Heckler*, 807 F.2d 771, 774
21 (9th Cir. 1987). The vocational expert’s testimony therefore must be reliable in light of the
22 medical evidence to qualify as substantial evidence. *Embrey v. Bowen*, 849 F.2d 418, 422-23 (9th
23 Cir. 1988). Accordingly, the ALJ’s description of the claimant’s functional limitations “‘must be
24 accurate, detailed, and supported by the medical record.’” *Id.* (quoting *Desrosiers*, 846 F.2d at
25 578 (Pregerson, J., concurring)).
26

1 Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*,
2 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess[]” this credibility
3 determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may
4 not reverse a credibility determination where that determination is based on contradictory or
5 ambiguous evidence. *See Allen*, 749 F.2d at 579. That some of the reasons for discrediting a
6 claimant’s testimony should properly be discounted does not render the ALJ’s determination
7 invalid, as long as substantial evidence supports that determination. *Tonapetyan v. Halter*, 242
8 F.3d 1144, 1148 (9th Cir. 2001).

10 To reject a claimant’s subjective description of symptoms, the ALJ must provide
11 “specific, cogent reasons for the disbelief.” *Lester v. Chater*, 81 F.3d. 821, 834 (9th Cir. 1995)
12 (citation omitted). Unless affirmative evidence shows the claimant is malingering, the ALJ’s
13 reasons for rejecting the claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.3d at
14 834.

16 A. Neck Pain

17 The record indicates that Ms. Culbertson has experienced pain from her cervical spine
18 condition and related headaches, as well as migraines. AR 1188-91 (treating physician discussing
19 two types of headaches Ms. Culbertson experiences). A treating neurologist assessed that Ms.
20 Culbertson had “a history of migraine headaches and significant trauma due to an improvised
21 explosive device (IED) explosion in Iraq with subsequent C5 through C7 vertebral fusion.” AR
22 1190. He also noted that “[s]he suffers from chronic migraines, in addition to likely cervicogenic
23 headache secondary to trauma.” *Id.*

25 These injuries have required significant treatment. Ms. Culbertson underwent a fusion of
26 her cervical vertebrae in 2010, in which plates were inserted in her neck. *See* AR 1049, 1189.

1 Ms. Culbertson has also received several medial branch blocks (most recently in April 2016, AR
2 1531-32), which are injections intended to relieve her neck pain and related headaches. AR 775,
3 1012, 1023. These injections worked for some months before the pain returned, Ms. Culbertson
4 reported, with “a vengeance.” AR 1023, 1049, 1188.

5 Ms. Culbertson has reported severe symptoms stemming from her neck injury. In a 2011
6 function report, she wrote that a plate in her neck caused “constant migraines.” AR 226. She
7 stated that she sleeps only 3 hours per night, or more if it is a “migraine and pain free day.” AR
8 227. And she wrote that the plate and bone spurs in her neck together with migraines leave her
9 “bed ridden a lot of the time.” AR 233.

11 She continued to report significant limitations due to neck pain in 2015: She wrote in
12 another function report that her neck fusion limited her range of motion and gave her headaches
13 “with prolonged bending” and that the plates in her neck made her unable to lift more than 50
14 pounds. AR 258. She reported sleeping only two to four hours per night. AR 260. She wrote that
15 she could not prepare foods that take a long time because the position of her neck would cause a
16 headache. *Id.* She also wrote that she could no longer do her favorite hobbies (sports, horse
17 riding, motorcycles, woodwork, hiking) along with everyday activities, because of the
18 combination of plates in her neck, headaches, and needing a bathroom due to Crohn’s disease.
19 AR 262. And she checked boxes indicating she is limited in almost every physical function,
20 including sitting, talking, and reaching, along with most cognitive functions. AR 263.

23 Ms. Culbertson reported being restricted in some of her activities, though not others: She
24 testified at the ALJ hearing that she was able to take care of her granddaughter. AR 56. She said
25 she does chores, though her son does the heavier chores; she cooks, drives, cares for herself, and
26 shops. AR 57-59. While her granddaughter is at school, Ms. Culbertson keeps things in order at

1 home and does volunteer work for Relay for Life for a couple of hours per day. AR 58. She
2 attends hour-long Relay for Life meetings once per month. AR 58-59. She paints often, for up to
3 an hour at a time. AR 60. But, she testified, she does not use the computer or read books because
4 of her neck pain. AR 60-61. In her most recent function report, Ms. Culbertson wrote that in a
5 typical day she takes her granddaughter to school, comes home and tries to craft, do yardwork,
6 and clean house, cooks, sleeps, and sits on the couch to wait to pick up her granddaughter. AR
7 259.
8

9 The ALJ discounted Ms. Culbertson's testimony that her neck pain becomes so severe
10 that she must stop performing functions like bending and activities like preparing food, playing
11 sports, and hiking, in addition to limitations from headaches associated with the neck pain. AR
12 24, 231, 260, 262. The ALJ noted that Ms. Culbertson socializes on Facebook, does online
13 classwork, reads, drives, and at times has cared for her grandchild for five hours per day. AR
14 227, 259-60, 444, 453, 880, 890. The ALJ credited and accounted for some of Ms. Culbertson's
15 testimony about her neck. For instance, the ALJ limited Ms. Culbertson to sedentary work,
16 which accords with her testimony that, per her doctor, she could lift only 10 pounds. *See* AR 22,
17 66.
18

19 Ms. Culbertson asserts that the ALJ erred in finding her activities inconsistent with her
20 reported symptoms, and in particular in relying on her role in caring for her grandchild. Ms.
21 Culbertson points out that while she testified that she read, used Facebook, and did classwork,
22 she did not say she did so "for sustained periods that would translate to work activity." Dkt. 10,
23 p. 8.
24

25 Claimants do not need to show they are "utterly incapacitated in order to be disabled."
26 *Revels v. Berryhill*, 874 F.3d 648, 667 (9th Cir. 2017). Activities such as childcare, washing

1 dishes, house cleaning, shopping, running errands, feeding pets, and other common domestic
2 responsibilities, do not detract from a claimant's credibility regarding her overall disability.
3 *Revels*, 874 F.3d at 667-68. An ALJ may rely on a claimant's daily activities to support an
4 adverse credibility finding when those activities contradict the claimant's subjective complaints
5 or are transferable to a work setting and the claimant spends a "substantial part of her day" on
6 them. *Smolen*, 80 F.3d at 1284 & n.7; *see Orn*, 495 F.3d at 639; *Trevizo*, 871 F.3d at 682.

8 "[D]isability claimants should not be penalized for attempting to lead normal lives."
9 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). "[M]any home activities may not be easily
10 transferable to a work environment," "where it might be impossible to periodically rest or take
11 medication." *Trevizo*, 871 F.3d at 682 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
12 1989)); *Smolen*, 80 F.3d at 1284.

13 In *Trevizo v. Berryhill*, an ALJ found based on the claimant's childcare responsibilities
14 that the claimant's subjective symptom testimony was less than credible. 871 F.3d 664, 682 (9th
15 Cir. 2017). The Ninth Circuit rejected the ALJ's finding, reasoning that

17 there is almost no information in the record about Trevizo's childcare activities;
18 the mere fact that she cares for small children does not constitute an adequately
19 specific conflict with her reported limitations. Moreover, "many home activities
20 are not easily transferable to what may be the more grueling environment of the
21 workplace, where it might be impossible to periodically rest or take medication."
Fair, 885 F.2d at 603. That appears to be the case here, where Trevizo's childcare
responsibilities permit her to rest, take naps, and shower repeatedly throughout
the day, all of which would be impossible at a traditional full-time job.

22 *Trevizo*, 871 F.3d at 682.

23 The same reasoning applies here. First, the record does not fully support the ALJ's
24 characterization of Ms. Culbertson's activities. Although the ALJ cited Ms. Culbertson's
25 testimony that she socializes on Facebook and statements in her 2011 function report that she
26 performed online classwork and read (AR 24, 61, 230), at the hearing Ms. Culbertson stated that

1 she does not use a computer or read because of her neck pain. AR 60-61. She demonstrated to
2 the ALJ how she checks Facebook, by holding her phone up in front of her face. AR 61.

3 In addition, the ALJ noted that Ms. Culbertson “watched her granddaughter for five hours
4 daily early in the record” and eventually became her primary caregiver. AR 24. Yet (as the ALJ
5 seemed to acknowledge) the “five hours” statement is dated 2011; Ms. Culbertson’s more recent
6 October 19, 2015 function report (and her testimony at the hearing in 2016) indicated only that
7 she was responsible for feeding her granddaughter, dropping her at school, and picking her up.
8 AR 56-58, 259.

10 The ALJ also found that “[o]ther records suggest [Ms. Culbertson] care[d] for several
11 children including a 4-year-old.” AR 24. This finding has no basis in fact. The ALJ’s decision
12 cited only one document, and that document is not accurate: it states Ms. Culbertson has “2 kids,
13 including a 4yo,” but Ms. Culbertson actually has only two adult sons. AR 852, 1542. Ms.
14 Culbertson testified at the hearing that she and her 26-year-old son shared childcare tasks for her
15 five-year-old granddaughter, such as getting her to school, preparing food, and doing other
16 chores. AR 56-58.

18 Second, even if this Court assumes, for purposes of argument, that the record supports the
19 ALJ’s characterization of Ms. Culbertson’s activities, nothing in the record shows those activities
20 are “‘easily transferable to what may be the more grueling environment of the workplace, where
21 it might be impossible to periodically rest or take medication.’” *Trevizo*, 871 F.3d at 682
22 (quoting *Fair*, 885 F.2d at 603). The ALJ found that “[t]aking care of a young child is very
23 exertional work,” citing the definition of a child care worker in the Dictionary of Occupational
24 Titles. AR 24. The ALJ wrote that “being the full-time caretaker of a preschool aged child is a
25 physically and mentally demanding endeavor.” AR 24. She found that Ms. Culbertson’s
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1 caretaker role thus “weighs strongly against” a disability finding. AR 24. The Ninth Circuit
2 expressly rejected this type of reasoning in *Trevizo*: “the mere fact that [the claimant] cares for
3 small children does not constitute an adequately specific conflict with her reported limitations.”
4 871 F.3d at 682.

5 Here, as in *Trevizo*, the ALJ’s decision generalized from evidence that the claimant
6 performs some childcare activities to find that the claimant could perform all the functions
7 childcare might require. Then, the decision of the ALJ extended that unsupported reasoning, by
8 analogizing Ms. Culbertson’s role to that of a full-time child care worker. AR 24. As in *Trevizo*,
9 the record contains few details about Ms. Culbertson’s specific childcare activities; when the
10 facts are interpreted in a reasonable way, nothing in the record negates Ms. Culbertson’s claimed
11 limitations from neck pain. The ALJ thus failed to give clear and convincing reasons to reject
12 Ms. Culbertson’s testimony about her neck pain and related headaches. These errors require
13 reversal. *See Lester*, 81 F.3d at 834.
14
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16 B. Headaches and Sleep Loss

17 As noted above, Ms. Culbertson’s medical records suggest that she suffered two types of
18 headaches: cervicogenic headaches related to her neck pain, and “normal migraines.” AR 1190-
19 91. But the ALJ’s decision did not appear to distinguish between the two types of headache, and
20 she discounted Ms. Culbertson’s statements about limitations from headaches in general. AR 24-
21 25 (“The claimant’s neck pain appears to be related to migraines and difficulty sleeping.”). Ms.
22 Culbertson challenges the ALJ’s consideration of her migraine headaches in addition to the
23 ALJ’s consideration of her neck pain. Because the ALJ did not distinguish between headaches
24 related to Ms. Culbertson’s neck injury and unrelated migraines, on remand the ALJ should
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1 reconsider the evidence relating to both types of headache in addition to Ms. Culbertson's neck
2 condition.

3 Ms. Culbertson also contends the ALJ failed to account for evidence of limitations due to
4 lack of sleep. Because the ALJ acknowledged that Ms. Culbertson's lack of sleep also appears to
5 be related to her neck pain and headaches, the Commissioner on remand should also reevaluate
6 limitations from sleep loss. *See* AR 24.

8 C. Crohn's Disease

9 Ms. Culbertson has been diagnosed with Crohn's disease. AR 25, 366-372, 1426. She
10 testified, "my Crohn's disease gives me joint pain and I get really depressed where I just—
11 because I can't function like I used to." AR 51. She testified that some days she does not leave
12 bed because her body hurts. *Id.* She takes 1-2 Percocet tablets per day for pain. AR 53.

14 She testified that joint pain from Crohn's disease also causes fatigue and weakness in her
15 arms. AR 51, 53-54. She gets only three hours of sleep per night, and requires one-hour naps
16 during the day due to fatigue. AR 55. And she testified that she wears adult diapers on a
17 consistent basis every day and needs frequent access to a bathroom because of incontinence from
18 Crohn's. AR 50. Within the 6-month period leading up to the hearing, the number of times that
19 Ms. Culbertson required an urgent "run" to the restroom during the day or night was five or six
20 *every day*, and there were times when she had to pull the car over immediately to access a
21 restaurant where she could use the bathroom. AR 51.

23 In her 2011 function report, Ms. Culbertson stated that she had to stop doing outdoor
24 activities because she needed to be near a bathroom. AR 230. Medical records dated January
25 2011 through October 2011 indicate that she was initially diagnosed with Crohn's disease in
26 2002, she was prescribed certain medications, and she had a partial resection of the ileum. AR

1 370, 408-410. She did not take medications for Crohn's again until 2011; then she was
2 prescribed, first, Methotrexate and Remicade, and then Humira after Remicade caused flushing
3 and throat swelling. AR 366-372, 408-415, 446, 455, 459, 467, 469, 485, 490-493. At the time of
4 the hearing, Ms. Culbertson testified that she was taking Humira, as well as nortriptyline,
5 Percocet, Zyrtec, topiramate, losartan, Phenergan, she was using knee braces and receiving
6 regular injections for knee pain. AR 63-67. She stated that she takes Phenergan about five times
7 per month, to counteract nausea, fistulas, and spasms in her stomach that are recurring symptoms
8 of Crohn's disease, and "it knocks [her] out:" she cannot drive or even move or function. AR 65-
9 67. Ms. Culbertson noted that her medication for Crohn's disease, Humira, was "not really doing
10 too much because now I have fistulas in my stomach that we're trying to figure out what we
11 could do about that and – because I'm allergic to every other medication we've tried." AR 50.

12
13 Ms. Culbertson points out that, although she alleged a number of impairments from
14 Crohn's disease, the ALJ addressed only abdominal pain and bowel movements. Dkt. 10, pp. 10-
15 11; see AR 25. The Commissioner responds that the ALJ's findings about Ms. Culbertson's
16 activities justify the ALJ's decision to reject Ms. Culbertson's testimony about other limiting
17 effects of Crohn's disease, such as body and joint pain and fatigue. See Dkt. 11, p. 4. The ALJ's
18 failure to consider associated effects of Crohn's disease other than gastrointestinal problems,
19 including fatigue and joint pain—as well as any side-effects of medications for Crohn's
20 disease—is harmful error. The ALJ should consider those effects on remand, together with neck
21 pain and related headaches. To reject a claimant's subjective description of symptoms, the ALJ
22 must provide "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d. 821, 834 (9th
23 Cir. 1995) (citation omitted). Unless affirmative evidence shows the claimant is malingering, the
24 ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81
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1 F.3d at 834. Here, there is no evidence of malingering, and the ALJ failed to assess the totality of
2 evidence concerning Ms. Culbertson's symptoms and limitations. *See Lester*, 81 F.3d at 834; *see*
3 *also Dix v. Sullivan*, 900 F.2d 135, 138 (8th Cir. 1990) (finding the plaintiff was disabled, based
4 on physical manifestations associated with the complainant's Crohn's disease, including severe
5 pain, nausea, fatigue, diarrhea, and the resulting inability to function in a workplace).

6 Therefore, reversal is warranted.

7
8 D. Weakness and Grip

9 Ms. Culbertson challenges the ALJ's finding that medical evidence contradicts Ms.
10 Culbertson's testimony that her arms are weak and she loses her grip at times. AR 23. The ALJ
11 acknowledged Ms. Culbertson's history of neck pain and cervical spine surgery. *See* AR 316-17,
12 669, 1366, 1416. She also noted that Ms. Culbertson has complained of left arm numbness. *See*
13 AR 1378. But the ALJ also noted that although one exam showed decreased sensation in fingers
14 on the left hand, AR 417, a later electrodiagnostic study was normal, AR 702-03, and in
15 numerous exams Ms. Culbertson showed full strength in her upper extremities and no sensory
16 deficits. *See, e.g.*, AR 428, 641, 775, 812, 831, 1144, 1190, 1236, 1242, 1335, 1370. *But see* AR
17 1051 ("slightly diminished sensation in L arm). The ALJ found that Ms. Culbertson's report of
18 bilateral hand swelling with difficulty closing her fists" was "not a typical report and . . . not
19 observed by medical personnel," and was contradicted by those objective tests. AR 24.

20
21
22 Ms. Culbertson contends these are not clear and convincing reasons to reject her
23 testimony. She asserts that the ALJ impermissibly "premise[d] a credibility finding on a lack of
24 medical support for the severity of a claimant's pain." Dkt. 10, p. 9.

25 Ms. Culbertson's argument conflates weakness and numbness with pain. Social Security
26 law recognizes special rules for addressing a claimant's statements about pain because pain

1 cannot be objectively measured or tested for. *See Smolen*, 80 F.3d at 1281. But as the record here
2 demonstrates, medical professionals do have methods of testing and measuring strength and
3 sensation. Ms. Culbertson’s test results contradict her testimony, so the ALJ did not err in relying
4 on them to discount that testimony. *See Regennitter v. Commissioner of Social Sec. Admin.*, 166
5 F.3d 1294, 1297 (9th Cir. 1998).

6
7 E. Side Effects of Medication

8 Finally, Ms. Culbertson challenges the ALJ’s consideration of her brief testimony about
9 the side effects of her pain medication. Ms. Culbertson testified that she takes one to two doses
10 of Percocet per day for joint pain from Crohn’s and knee pain. She stated that it makes her
11 “loopy/air-heady,” then she falls asleep. AR 53. The ALJ discounted this testimony, finding that
12 the medical record showed Ms. Culbertson “was typically observed to have intact memory,
13 concentration, and attention despite medications.” The ALJ also found that Ms. Culbertson’s
14 activities—including driving and being “the primary care provider for her young
15 granddaughter”—are consistent with the RFC despite Ms. Culbertson’s use of medications.

16
17 Ms. Culbertson contends that the ALJ’s reliance on objective testing showing intact
18 memory and concentration was misplaced. She points out the ALJ did “not indicate what exams
19 were performed . . . and it is doubtful that cognitive assessment was the focus of any exam the
20 ALJ was referring to.” Dkt. 10, pp. 7-8. An ALJ can rely on objective evidence that contradicts
21 alleged limitations to discount that testimony. *See Regennitter*, 166 F.3d at 1297. The ALJ did so
22 here, yet the longitudinal evidence in the record shows that Ms. Culbertson’s pain management
23 has been a difficult problem and many different medications are being taken by her to try and
24 address multiple conditions and symptoms. Moreover, symptoms and the types of medications to
25 address various conditions may change as symptoms wax and wane. *Taylor v. Comm’r of Soc.*
26

1 *Sec. Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011); *see also Dix v. Sullivan*, 900 F.3d 135, 138
2 (8th Cir. 1990) (describing the variable physical manifestations associated with the
3 complainant’s Crohn’s disease, including severe pain, nausea, fatigue, diarrhea, and the resulting
4 inability to function in a workplace).

5 Dr. Shirley Paski, M.D. provided a letter in 2016 describing Ms. Culbertson’s Crohn’s
6 disease as having been long-term (since 2002); Dr. Paski indicated that the plaintiff’s Crohn’s
7 disease was addressed by prescriptions for many different types of medications, and that Ms.
8 Culbertson suffered with a variety of severe negative medication side-effects; Dr. Paski noted
9 that “in addition to her gastrointestinal symptoms, she has also experienced . . . chronic
10 arthralgias and myalgias” and “intermittent inflammatory ocular symptoms with uveitis.” AR
11 1553. As of November 2016, medical records from the Veteran’s Administration indicate that
12 Ms. Culbertson “continues to have frequent bowel movements, and will end up sitting on the
13 toilet up to 30 minutes to complete evacuation. . . . She also continues to have arthralgia which
14 have been considered an extraintestinal manifestation of Crohns. Migraine headaches were also
15 exacerbated after endoscopic procedures.” AR 1555. Ms. Culbertson testified about the variable
16 nature of her symptoms and the different medications she was taking, and the medical records
17 reflect many changes in her conditions and medications, individually and collectively, over time.
18 AR 49-54, AR 63-67, 366-372, 408-15, 446, 455, 459, 467, 469, 485, 490-93, 1553, 1555-61. In
19 December 2016, Dr. Paski stated that Ms. Culbertson “was re-started on methotrexate and
20 infliximab and experienced a severe infusion reaction. She was transitioned to adalimumab
21 shortly thereafter and remains on adalimumab to this day, but her dosing has required significant
22 increase to every 5 days (instead of the usual every 14 days) for diarrhea management. . . . [w]e
23 are currently re-assessing her medical options – of which few options are available.” AR 1553.
24
25
26

1 In determining the plaintiff's RFC, an ALJ is required to consider all relevant evidence in
2 the record, including (but not limited to) medical records, evidence from lay witnesses, and "the
3 effects of symptoms, including pain, that are reasonably attributed to a medically determinable
4 impairment.'" *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (quoting SSR
5 96-8p, 1996 WL 374184, at *5). The ALJ is not allowed to disregard properly supported
6 limitations when considering the complainant's RFC. *Robbins*, 466 F.3d at 886. Here, the ALJ
7 failed to offer a clear and convincing reason to discount Ms. Culbertson's testimony about the
8 side effects of pain medications. On remand, the ALJ is directed to consider the entire record and
9 take additional evidence on the issue of medication side-effects, as well as potential
10 complications of having so many different types of medications -- so that the interactive effects
11 are explored more completely.
12

13 14 V. REMAND FOR FURTHER PROCEEDINGS

15 The Court may in its discretion remand this case "either for additional evidence and
16 findings or to award benefits." *Smolen*, 80 F.3d at 1292; *see Trevizo v. Berryhill*, 871 F.3d 664,
17 682 (9th Cir. 2017). If an ALJ makes an error and there is uncertainty and ambiguity in the
18 record, the district court should remand to the agency for further proceedings. *Leon v. Berryhill*,
19 874 F.3d 1130, 1133 (9th Cir. 2017). If the district court concludes that additional proceedings
20 can remedy the errors that occurred in the original hearing, the case should be remanded for
21 further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017).
22

23 In general, the Court should remand for an award of benefits where:

24 "1) the record has been fully developed and further administrative proceedings
25 would serve no useful purpose; (2) the ALJ has failed to provide legally
26 sufficient reasons for rejecting evidence, whether claimant testimony or
medical opinion; and (3) if the improperly discredited evidence were credited
as true, the ALJ would be required to find the claimant disabled on remand."

1 *Trevizo*, 871 F.3d at 682-83 & n.11 (quoting *Garrison*, 759 F.3d at 1020).

2 In this case, the record is not fully developed. And, the ALJ failed to properly interpret
3 and apply the law concerning certain legal aspects of this case. On remand, the ALJ should
4 review the evidence of neck pain separately from migraines, and consider the symptoms and
5 limitations related to each condition. In addition, the ALJ must evaluate how migraines, and the
6 symptoms and limitations associated with the migraines, are related to Ms. Culbertson's neck
7 condition, separately from other potential causes and symptoms of migraines. And, the ALJ must
8 consider evidence relating to side-effects of medications that Ms. Culbertson takes for migraines
9 and neck pain and limitations related to those side-effects.
10

11 In addition, the ALJ must consider all the evidence bearing on the credibility of Ms.
12 Culbertson's testimony concerning the severity of her symptoms. And, the ALJ must avoid
13 discounting Ms. Culbertson's testimony because Ms. Culbertson is getting out of bed and doing
14 common chores and recreational activities that are consistent with the symptoms and limitations
15 associated with her conditions—such as trying to take care of a grandchild. There is no evidence
16 of malingering in this case, and Ms. Culbertson's symptoms are consistent with the objective
17 physical evidence that is contained in the longitudinal medical records in this matter.
18

19 Moreover, the ALJ on remand is required to fully consider all the symptoms that Ms.
20 Culbertson experiences from Crohn's disease, take additional evidence if necessary regarding
21 symptoms, limitations that she has experienced in her ability to work because of symptoms and
22 also any side-effects of medications for Crohn's disease. The ALJ must evaluate all symptoms
23 and any limitations that result from those symptoms, as well as any limitations that result from
24 side-effects from interactions between various medications that she takes to manage her
25 conditions.
26

Only by considering the entire record, without discounting Ms. Culbertson's testimony about severity of symptoms, and how those symptoms affect her ability to work, and by including any new evidence regarding the issues described above, will the ALJ be able to assess the plaintiff's RFC in an accurate and legally fair manner. A proper hypothetical to the vocational expert may then be based on all limitations for which the longitudinal record provides substantial evidence. Each of Ms. Culbertson's limitations must be included in that hypothetical in order for the step five determination to be supported by substantial evidence. *Robbins*, 466 F.3d at 886.

CONCLUSION

Based on the foregoing discussion, the Court finds the ALJ improperly determined Ms. Culbertson to be not disabled. The Commissioner's decision to deny benefits is therefore REVERSED and this matter is REMANDED for further administrative proceedings.

DATED this 3rd day of January, 2018.

Theresa L. Frutke

Theresa L. Fricke
United States Magistrate Judge